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No. 71-68

In the Supreme Court of the United States

OCTOBER TERM, 1971

MAGGIE BAILEY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The Tax Court held that petitioner incorrectly reported federal income tax for the years in question, 1945 through 1963, during which she operated a retail liquor business in violation of a local prohibition against liquor sales (R. 370a–371a).[1] It determined deficiencies in petitioner's income tax for those years and additions to tax, but did not make additions to tax for fraud (R. 393a–394a).[2] The court of appeals affirmed *per curiam* (Pet. App. A, p. 33).

[1] "R." references are to the record appendix filed in this case in the court below.

[2] The Tax Court decision is unofficially reported at 29 CCH Tax Ct. Mem. 272.

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Petitioner kept no records (R. 376a–377a), and hence the Commissioner employed the net worth-expenditure method of proof (R. 378a). The principal dispute at trial concerned the amount of cash that petitioner had on December 31, 1963, the closing net worth date.

The Commissioner's proof on this point was based on the testimony of a state trooper. He related that on February 18, 1965, he searched the petitioner's premises for illicit liquor, under the authority of a local warrant (R. 114a). The warrant was based on an affidavit stating that one Charles Young had purchased illicit liquor at the petitioner's residence one day before the search (R. 116a). During the search, the officers found a footlocker, opened it, and discovered a large amount of cash, which they counted to be $206,909 (R. 126a, 128a, 275a). They did not take any of the money from the premises. Petitioner objected to the state trooper's testimony (R. 267a–268a, 311a);[3] she claimed that she counted the money a day or so later and had only $116,300 (R. 312a). The Tax Court credited the trooper's testimony, and computed peti-

[3] In response to the court's inquiry concerning the basis for the objection, petitioner's counsel responded (R. 267a–268a):

"* * * We do object to the testimony on two grounds. One, that this is way beyond the period, this is 1965 he's testifying to, and secondly, we think this was a search and they haven't presented the search warrant or showed, they haven't showed yet that they had a search warrant for Mrs. Bailey. I'd like to see a copy of what he says they served. I think, Your Honor, this is not within the realm of a search warrant for alcoholic beverages, and I think the testimony should not be allowed. I don't know what the testimony is going to be, but I imagine it will be prejudicial."

tioner's tax liability based on a December 31, 1963 cash balance of $200,000.[1]

In this Court, petitioner contends that the trooper's testimony was inadmissible because the warrant was unsupported by probable cause and the search went beyond the description in the warrant, and that the court's decision denied her due process because the finding concerning the cash she had was "devoid of evidentiary support" (Pet. 5).

1. The warrant was based on probable cause. Officer Mayberry, on whose affidavit (R. 116a) the warrant was issued, stated that his information came from Charles Young, who, the affidavit indicated, actually purchased illicit liquor from Maggie Bailey's premises. The affidavit named the informant and included precise information about the time of his purchases and the amounts and kinds of liquor he had purchased. Although the affidavit contained no independent statement about the informant's reliability, such precise information producing such a clear certainty of criminal activity was sufficient to establish probable

[1] 29 CCH Tax Ct. Mem. at 275, 277.

[2] Even if this search was unlawful, as petitioner contends, that would not require exclusion in a civil proceeding such as this one of the evidence obtained. See *Kennedy* v. *Coyle*, 352 F. 2d 867, 870 (C.A. 7); compare *Cleary* v. *Bolger*, 371 U.S. 392. The cases petitioner cites as conflicting with the decision below (Pet. 22–29) generally are not in point, since they involved criminal prosecutions or forfeiture of other civil proceedings "quasi-criminal in character * * * to penalize for the commission of an offense against the law." *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700. *Rogers* v. *United States*, 97 F. 2d 691 (C.A. 1), on which petitioner also relies, involved evidence obtained by federal officers under a warrant that had been judicially declared invalid.

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cause.[5] Compare *United States* v. *Harris*, No. 30, O.T. 1970, decided June 28, 1971.

Nor did the search go beyond the description in the warrant. The money was found while the officers were searching the area designated in the warrant, the petitioner's residence from which she sold her liquor and in which she stored her inventory (R. 218a, 263a, 279a–280a). The officers properly opened the footlocker, in which the money was located; it might have contained illicit liquor, such as they had found hidden elsewhere in the house (R. 263a). Given the validity of the discovery of the money, its counting cannot turn the search into one that was constitutionally overbroad. Since petitioner was not on the premises the counting was justified to safeguard against a possible claim that the officers had removed some of the money.

2. There is ample record support for the factual findings concerning the amount of cash petitioner had. The court credited the testimony of the officer who supervised the count of the money over that of petitioner. The court's determination on credibility, an issue for the trier of fact, was not clearly erroneous, and thus it should not be disturbed. See *United States* v. *Yellow Cab Co.*, 338 U.S. 338.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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